

No. 16,491

IN THE

**United States Court of Appeals
For the Ninth Circuit**

S. B. HUFFMAN, Trustee of the Estate
of Newcomb Interests, Inc., a cor-
poration, doing business as Casa Del
Rey Hotel, Bankrupt,

Appellant,

vs.

HARRY A. FARROS,

Appellee.

APPELLANT'S OPENING BRIEF.

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Appellee.

APPELLANT'S OPENING BRIEF.

STATEMENT OF JURISDICTION.

The Referee in Bankruptcy on November 2, 1956, made and entered his Order Granting Trustee's Petition for Leave to Sell Personal Property Free and Clear of Liens (T.R. pp. 6-8) which Order was made in proceedings pending in the United States District Court for the Northern District of California, entitled "In the Matter of Newcomb Interests, Inc., a corporation, doing business as Casa Del Rey Hotel, Bankrupt", and numbered 44913 in the records and files of said Court. Appellee's Petition to have the

Order reviewed by the District Court was filed on December 5, 1956. (T.R. pp. 3-5.) The Petition was timely (11 U.S.C.A. 67c), and the District Court had jurisdiction to review the Order. (11 U.S.C.A. 67c.) In a memorandum and order made and entered on April 1, 1959, the District Court reversed the aforesaid Order of the Referee. (T.R. pp. 35-40.) Notice of appeal therefrom to this Court was filed May 7, 1959. (T.R. p. 41.) The appeal was timely. (11 U.S.C.A. 48.) The jurisdiction of this Court to review the memorandum and order is sustained by 11 U.S.C.A. 47.

STATEMENT OF QUESTION PRESENTED.

The question before the Court is:

Does the Appellee, who was the former owner of a liquor license, and who purported to lease the same along with the real property to the Bankrupt, have the right as against Appellant Trustee in Bankruptcy to reclaim the liquor license from the bankrupt estate?

SPECIFICATION OF ERROR.

The Appellant's Concise Statement of Points Urged on Appeal, filed herein (T.R. pp. 61-62) gives in detail the points relied upon by Appellant. They are as follows:

1. That said Order was not supported by the evidence and is contrary to the law in that:

(a) The holding by said District Judge that the liquor license could not be subject to any creditor's claim of lien is erroneous and contrary to law.

(b) The holding of the District Judge that the property held under trust cannot here be reached by the Trustee's creditors since the beneficiary did nothing to induce the Trustee's creditors to rely on the apparent worth of that title, is erroneous and contrary to law.

STATEMENT OF FACTS.

The facts as set forth in the Stipulation as to Facts filed in these proceedings (T.R. pp. 15-18) are as follows:

“That on July 25, 1946, Harry A. Farros, Michel Stamatopolous and Themis Stamatopolous, as Lessors, entered into a written lease agreement with the bankrupt, Newcomb Interests, Inc., as Lessee, for a term of fifteen years and one month, commencing on August 1, 1946, which lease was duly executed, acknowledged and recorded in the Office of the County Recorder of the County of Santa Cruz, State of California, on August 5, 1946. That thereafter Appellee Harry A. Farros, purchased all of the interest covered by the lease, both real and personal, from said Michel Stamatopolous and Themis Stamatopolous, and at all times herein mentioned was the sole owner of the property, both real and personal. That on the said 25th day of July, 1946, at the time of the execution of said lease, the said Lessors were the owners of the on-sale gen-

eral liquor license issued by the State Board of Equalization of California, and then in effect in the said demised premises, and as part of the transaction and the execution of said lease and without any additional consideration whatsoever from the Lessee therein to the said Lessors, the said Lessors transferred said on-sale general liquor license covering said premises to Newcomb Interests, Inc., the bankrupt. That in said lease in paragraph Twenty-Sixth thereof, it was specifically provided as follows:

‘Twenty-sixth: That the lessor has transferred to the lessee all liquor licenses covering the sale of liquor in the demised premises, and the lessee agrees that at the expiration of the term of this lease or of the renewal period thereof, if the same is renewed, the said lessee will transfer to said lessor, all liquor licenses covering said premises without any consideration whatsoever on the part of the lessor.’

“That the bankrupt Lessee defaulted in the performance of the lease agreement in failing to pay the rental due on the said lease commencing with the monthly installment due on the 1st day of August, 1954, and continuing to default at all times thereafter.

“That on the said 25th day of July, 1946, Section 7.3 of the Alcoholic Beverage Control Act had not been adopted and there was no regulation of the Board of Equalization of the State of California preventing the legal execution and enforcement of the provisions of paragraph Twenty-sixth of said lease hereinabove set out; that the said Section 7.3 did not

become effective until October 1, 1949, more than three (3) years following the execution of said lease.

“That as security for the payment of the rental under said lease, said bankrupt Lessee executed a chattel mortgage covering the personal property located in said hotel, which chattel mortgage was duly foreclosed by Appellee, Harry A. Farros, on September 30, 1954, at which time Appellee entered into possession of said hotel and has been in possession at all times since that date.

“That at the time of the filing of the original Petition in Bankruptcy herein on the 6th day of June, 1955, said On-Sale General Liquor License No. P-6259-C stood in the name of Newcomb Interests, Inc., a corporation doing business as Casa Del Rey Hotel, into which name it had been transferred by the Lessors on or about July 25, 1946, at the time of the execution of said lease and under the terms thereof.”

ARGUMENT.

I. THE LIQUOR LICENSE IS PROPERTY WHICH PASSED TO THE APPELLANT TRUSTEE IN BANKRUPTCY AND CAN BE REACHED BY THE BANKRUPT'S CREDITORS.

There is no possibility of dispute that a liquor license is property, title to which passes to the Trustee in Bankruptcy, and that it is so treated by the Courts of the State of California. *Roehm v. County of Orange*, 32 C. A. 2d 280, 187 P. 2d 49, by the United States District Court in the State of California; *In*

Re Quaker Room, 90 Fed. Supp. 758, and by this Court in *Citrigno v. Williams*, 255 F. 2d 675.

The Appellant Trustee in Bankruptcy acquires his right to the license from Section 7¹ of the Alcoholic Beverage Control Act as amended in 1947, Rule 60b of the Rules and Regulations of the State Board of Equalization and Section 70a (11 U.S.C. 110a) of the Bankruptcy Act.

Section 70a of the Bankruptcy Act vests in the Trustee title to all property of the bankrupt, which the bankrupt could, by *any means*, have transferred. Ruly 60b of the State Board of Equalization states that "a Trustee of the bankrupt estate of a *licensee* may execute a transfer application." It is conceded that the bankrupt was, at the time of the filing of the petition in bankruptcy, the licensee.

At the time of the filing of the petition in bankruptcy any creditors inquiring of the State Board and selling liquor or other merchandise to the bankrupt on credit would be entitled to rely on this ownership of record. Appellee clearly permitted the bankrupt to exercise dominion over the license and to use the same in the operation of the bankrupt's business.

Very pertinent is the opinion of the Supreme Court of the United States in *Benedict v. Ratner*, 268 U.S. 353, 69 L. Ed. 991, wherein, in discussing assignments of accounts receivable, the Court stated, at page 364:

"The results which flow from reserving dominion inconsistent with the effective disposition

¹Now Section 24071 of the Business and Professions Code of the State of California.

of title must be the same *whatever the nature of the property transferred*. The doctrine which imputes fraud where full dominion is reserved must apply to assignment of accounts although the doctrine of ostensible ownership does not . . . the assignment must be deemed fraudulent in law, if it is agreed that the assignor may use the proceeds as he sees fit.” (Italics ours.)

Where the consent of the State Board of Equalization was required to the transfer of the liquor license, the question of title cannot be separated from the provisions of the state law setting forth the manner in which the title must be transferred. See *England v. Nyhan*, (9th Cir.) 141 Fed. 2d 311, a case involving the transfer of a permit to operate taxicabs, where the Court stated, at page 313:

“But it is clear, and undisputed here, that at the time the petition in bankruptcy was filed the permit to operate the taxicabs was *in the name of the bankrupt and by the provisions of the local laws he was the only person able to operate the cabs under its sanction*. It is likewise clear that any attempted transfers made prior to the filing date were ineffectual and the appellee took nothing . . .” (Italics ours.)

In 1949 the Legislature of the State of California enacted Section 7.3 of the Alcoholic Beverage Control Act.² The Appellate Courts of the State of California

²“No licensee shall enter into any agreement wherein he pledges the transfer of his license as security for a loan or as security for the fulfillment of any agreement. Each application for the transfer of a license must be accompanied by or contain a statement verified by both the transferor and transferee specifi-

have held that Section 7.3 does not have a retroactive effect, *as between the parties to the transaction*. See *Campbell v. Bauer*, 104 C. A. 2d 740, 232 P. 2d 590; *Tognoli v. Taroli*, 127 C. A. 2d 426, 273 P. 2d 914; *Etchart v. Pyles*, 106 C. A. 2d 549, 553, 554, 235 P. 2d 427, 430; *Saso v. Furtado*, 104 C. A. 2d 759, 769, 232 P. 2d 583, 589.

In all of these cases the Court held that the failure to enforce the agreement would amount to a fraud, since the licensee would substantially gain by his misconduct. Here, however, the party claiming the ownership of the license against the Appellee is Appellant Trustee in Bankruptcy representing the Creditors of the licensee who did business with and extended credit to the licensee-bankrupt on the basis of his record ownership of the license. It was held *In the Matter of Norman A. Murphy, doing business as Murfee's, Bankrupt*,³ that *such creditors had no duty to look further than to the face of the license to determine whether or not the person with whom they were doing business was, in fact, the licensee*.

cally stating that the transfer application or proposed transfer is not made to satisfy the payment of a loan or to fulfill an agreement entered into more than ninety (90) days preceding the day on which the transfer application is filed with the board or to gain or establish a preference to or for any creditor of transferor or to defraud or injure any creditor of transferor. Said statement shall become part of the transfer application and any misrepresentations contained in said statement shall be considered the misrepresentation of a material fact." Effective October 1, 1949. (Now Section 24076 of the Business and Professions Code of the State of California.)

³United States District Court for the Northern District of California, Case No. 38370 (cited by the Referee in his Certificate, T.R. p. 25).

Under Section 2(z 1) (Now Section 23009 of the Business and Professions Code of the State of California) of the Alcoholic Beverage Control Act, a "licensee" is "any person holding a license issued by the Board," and Section 3 (now Section 23300 of the Business and Professions Code of the State of California) of the same Act, reads, in part, as follows:

"No person shall exercise the privilege or perform any act or acts which a licensee under this act may exercise or perform under the authority of a license issued under this act *unless such person is authorized to do so by a license duly issued pursuant to the provisions of this act.*" (Italics ours.)

and Section 7 (now Section 24070 of the Business and Professions Code of the State of California) of the Alcoholic Beverage Control Act makes a transfer of the license contingent upon approval of the State Board of Equalization (now the Department of Alcoholic Beverage Control), and the payment of a transfer fee. It is clear that at no time prior to the filing of the Petition in Bankruptcy herein had Appellee obtained the approval of the Alcoholic Beverage Control Board to a transfer to him of the license in question, nor had he paid the transfer fee. Therefore, he could not be considered as the owner of the license.

We will concede, for the purposes of argument, that *as between Appellee and the Bankrupt*, Appellee might be able to require a transfer of the license by means of a state court action; it is submitted, how-

ever, that, as against Appellant Trustee, the Appellee is not entitled to exercise any of the rights of ownership since the license was, at all times after July 25, 1956, in the name of and legally belonged to the bankrupt.

II. THE LIQUOR LICENSE IS PROPERTY SUBJECT TO A CREDITOR'S CLAIM OF LIEN.

The District Judge in his memorandum and order here appealed from, held that the liquor license could not have been subject to any creditor's claim. (T.R. p. 38.) Section 70a(5) 11 U.S.C.A. 110a(5) provides as follows:

"The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located . . . (5) *property*, including rights of action, *which* prior to the filing of the petition *he could by any means have transferred* or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered . . ."

(Italics ours.)

and Section 70c of the Bankruptcy Act (U.S.C.A. 110c) provides:

"The trustee may have the benefit of all defenses available to the bankrupt as against third

parties, including statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. *The trustee, as to all property*, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date, *with all the rights, remedies and powers of a creditor then holding a lien thereon by such proceedings*, whether or not such a creditor actually exists.” (Italics ours.)

In *Golden v. State of California*, 133 Cal. App. 2d 640, 285 P. 2d 49 at 53, the Court held that the liquor license was property upon which the United States could and did acquire a lien, citing *In Re Quaker Room*, 90 Fed. Supp. 758, and decisions from other jurisdictions. In *United States v. Blackett*, 220 F. 2d 21, cited by the State Court in *Golden v. State of California*, supra, a creditor of Blackett obtained a judgment against Blackett, and after examination of Blackett in supplemental proceedings on the unsatisfied judgment, the liquor license was ordered sold by the Court, and the government levied upon the proceeds. This Court held that the government was entitled to the proceeds of the sale of the license, although finding that the government had not attempted to impose its lien against the license because of the facts of the case. However, in the *Golden* case, supra, the Appellate Court of the State of California, held

that *the government could obtain a lien on the license*, and this Court is bound to apply the law of the State of California. The state courts, not the federal courts, are the final arbiters of the state law, and this is true even though the announcement of state law is made by an intermediate state appellate court. *Six Companies of California v. Joint Highway District No. 13 of California*, 311 U. S. 180 (1940); *West v. American Telephone and Telegraph Co.*, 311 U.S. 223 (1940).

Since, under Section 70c of the Bankruptcy Act, *supra*, the Trustee is deemed to be vested with all of the rights, remedies and powers of a creditor then holding a lien in such proceeding, whether or not such a creditor exists, the District Court erred in finding that creditors and thus Appellant Trustee could not obtain a lien on the liquor license. This is true “*whether or not a creditor actually existed.*” See *Constance v. Harvey*, (2 Cir.) 215 F. 2d 571, cited with approval by this Court in *England v. Sanderson*, 236 F. 2d 641 at 643.

This question has also been effectively disposed of and all of the authorities on the subject are covered in the Opinion of the Attorney General of the State of California of June 9, 1959, numbered 59/40, which opinion is set forth, in full, in Appendix “A” hereof.

CONCLUSION.

In view of the facts and law hereinabove set forth, it is Appellant's contention that the provisions of Section 7.3 of the Alcoholic Beverage Control Act, do not apply as against Appellant; that the creditors of the bankrupt could have obtained a lien on the liquor license and that the liquor license is, therefore, properly an asset of the bankruptcy estate, and that Appellee cannot reclaim same and that the memorandum and order of the District Judge here complained of, should be, by this Court, reversed and remanded with instructions to the District Court to make and enter an order in said bankruptcy proceedings affirming the Referee's Order of November 2, 1956.

Dated, Burlingame, California,
August 31, 1959.

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(Appendices A and B Follow.)

Appendices.

Appendix A

Office of the Attorney General
State of California

Stanley Mosk
Attorney General

Opinion
of
Stanley Mosk,
Attorney General;
Walter J. Wiesner,
Deputy Attorney General.

No. 59/40

The Honorable Thomas W. Martin, Director of the Department of Alcoholic Beverage Control, has requested the opinion of this office on the following questions:

1. Are licenses issued by the department subject to attachment and execution?
2. If licenses issued by the department are subject to attachment and execution, what are the rights of a purchaser at an execution sale?

The conclusions may be summarized as follows:

Licenses issued by the Department of Alcoholic Beverage Control are subject to attachment and execution. The purchaser may request transfer of the license to himself or his transferee but the department retains the right to revoke or suspend the license if the licensee has engaged in conduct which would

justify a revocation or suspension and may exercise its discretion in determining whether or not to approve the transfer of the license to the purchaser or his transferee.

ANALYSIS

To determine whether a liquor license is subject to attachment and execution, it is necessary to ascertain the nature of the right created by the issuance of a license. Only "property" is subject to attachment and execution under sections 541 and 688 of the Code of Civil Procedure.

A liquor license is a unique thing. Article XX, section 22 of the California Constitution provides that the department has the power "in its discretion, to deny, suspend or revoke any" license if it determines that such action is desirable or necessary. Section 23300, Alcoholic Beverage Control Act, (hereinafter all section references are to the Business and Professions Code unless otherwise noted) provides that no person may exercise "the privilege" of engaging in an alcoholic beverage business without a license. And in a case where the rights of a licensee vis-a-vis the licensing agency were at issue, it was held that a license was a privilege and not property as that term is used in the due process clause of the Constitution. *State Bd. of Equalization v. Superior Ct.*, 5 Cal. App.2d 374.

It is common knowledge, however, that liquor licenses are bought and sold in the open market. (*Mollis v. Jiffy-Stitcher Co.*, 125 Cal. App.2d 236, 238).

For this reason the courts have, where the licensee and a party other than the licensing agency were involved, considered such licenses to be property. *Roehm v. County of Orange*, 32 Cal.2d 280; *Golden v. State of California*, 133 Cal. App.2d 640; and *In re Quaker Room*, 90 Fed. Supp. 758. In the *Roehm* case the California Supreme Court held that liquor licenses are not subject to ad valorem taxation as personal property because they are not included in the list of taxable intangibles specified in article XIII, section 14 of the California Constitution and section 111 of the Revenue and Taxation Code. Implicit in the opinion is the premise that liquor licenses are intangible property. In the *Golden* case, the court held that a license was property as that term is used in 26 U.S.C. sec. 3670, which gives the federal government a lien for taxes "upon all property and rights to property, whether real or personal, belonging to such person." And in the case of *In re Quaker Room*, the court held that a California liquor license was property as that term is used in the Bankruptcy Act. The court therein referred to the decisions refusing to classify a license as property for purposes of the due process clause as being a "characterization for . . . a limited purpose." The courts in the last two cases emphasized the fact that liquor licenses are transferable under the Alcoholic Beverage Control Act (secs. 24070 to 24076 Bus. & Prof. Code).

At least two courts in other jurisdictions have held transferable liquor licenses subject to attachment or execution. (*Rowe v. Colpoys*, 137 Fed.2d 249; 148

A.L.R. 488; and *Stallinger v. Goss* (Mont.), 193 Pac.2d 810.) In the *Rowe* case the court stated "No good reason, either of procedure or policy, has been urged, and none is apparent, for exempting this form of property right, and its tangible evidence, from the same process as that to which other property rights are subject. The appellate department of the Superior Court in San Diego County relied on these cases in holding that a liquor license was subject to execution in California. *Cross & Bates v. Blackett*, Unreported Memorandum Decision by Turrentine, P.J., San Diego County, Superior Court No. 158544. See, also the dissenting opinion in *Roehm v. County of Orange*, *supra*, and the discussion of this point in *Golden v. State of California*, *supra*, at 644 and 645.

In view of the above cases in which it was held or implied that a license is to be considered property in California where the licensing agency is not a party to the action, it must be concluded that liquor licenses are property as that term is used in sections 541 and 688 of the Code of Civil Procedure.

It has been contended however that even if liquor licenses are property, seizure and sale by a sheriff pursuant to a writ of execution are not permissible inasmuch as a transfer by sheriff's sale is not specifically authorized in sections 24070 through 24076.

Those sections do not support such a restrictive interpretation. Section 24070 provides that "Each license . . . is transferable *from* the licensee to another person" whereas section 24071 provides that a license "may be transferred *by or to*" certain named persons

and that with respect to such transfers the fee to be paid shall be substantially less than that provided for in section 24070. (Emphasis added.) Under section 24070 a license may be transferred “from” the licensee but need not be transferred “by” him. To qualify for the reduced transfer fee under section 24071, the transfer must be “by or to” one of the persons named therein. Thus it appears that licenses are made transferable by section 24070 and there is no necessity for a person to be listed in section 24071 before he may execute a transfer application.

In two cases, *Campbell v. Bauer*, 104 Cal. App.2d 740 and *Saso v. Furtado*, 104 Cal. App.2d 759, it was held that a court appointed commissioner could transfer a license though he is not specifically mentioned in the above sections. Although the court did not discuss the right of the commissioner to transfer the license, it stated, at page 770 in the *Saso* case, “The Board is required to recognize plaintiff as the transferee-applicant for a license, and the commissioner as the transferor.” Obviously the court did not believe that only licensees and those named in section 24071 could be transferors. (Cf. 14 Ops. Cal. Atty. Gen. 35 (1949).)

Section 24075, wherein transfers by certain named individuals including persons “acting in the legal or proper discharge of official duty” are exempted from the notice and escrow requirements of sections 24073 and 24074, also supports the broader interpretation. If only transfers by licensees and those mentioned in section 24071 had been contemplated,

there would have been no necessity for exempting transfers by the other persons named in section 24075. It should be noted that the court in the *Cross & Bates* case, *supra*, relied on this section in holding a license subject to execution. Nor is section 24076, which requires a statement by the transferor and transferee that the proposed transfer is not made to satisfy a loan or fulfill an agreement entered into more than 90 days prior to the filing of the transfer application, inconsistent therewith. In *Holt v. Morgan*, 128 Cal. App.2d 113, 116, the court stated that "the purpose and policy of the section is to prohibit all use of a liquor license as security." Though the coverage of the section is not limited to pledges of licenses (*Citrigno v. Williams*, 255 F.2d 675), it seems clear that it was not intended to prohibit execution sales.

Although it is concluded that the property interest of the licensee is subject to attachment and execution and the sheriff or the purchaser may transfer that interest, it should not be inferred that the purchaser may then commence selling alcoholic beverages. The purchase of the interest of the licensee does not carry with it the right to an automatic approval of the transfer of the license by the department. A license is transferable only "upon the approval of the department" (sec. 24070) and the department is required to exercise its discretion (art. XX, sec. 22, Calif. Const.). The department may refuse to renew "or transfer" any license where there are outstanding tax liabilities which arose in the operation of the licensed business (sec. 24049). Moreover, if the li-

censee has engaged in conduct which would justify the suspension or revocation of the license under sections 24200 or 24200.5, the license would remain subject to revocation or suspension. As the court pointed out in the *Saso* case, *supra*, 768, all transactions involving the transfer of a license must be considered as containing an implied condition "that the transfers must be subject to the approval of the [department] and subject to its rules."

* * * * *

Appendix B

TABLE OF EXHIBITS

Rule 18 2(f)

Exhibit No. 1	Lease Agreement dated August 1, 1946	T. R. pp. 42-58
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